Supreme Court, U.S.
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No. 92-822

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

E.L.U.L. REALTY CORP.,

Petitioner,

vs.

GREYHOUND EXHIBITGROUP, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court review a decision of the Court of Appeals for the Second Circuit affirming the District Court's refusal to allow evidence of the comparative fault of the parties at a damages Inquest held after petitioner had defaulted?

2. Should this Court review a decision of the Court of Appeals for the Second Circuit affirming the District Court's determination that petitioner's claim of a set off was barred as a compulsory counterclaim by Fed. R. Civ. P. 13?

3. Should this Court review a decision of the Court of Appeals affirming the District Court's refusal to modify the condition imposed pursuant to Fed. R. Civ. P. 55(c) that petitioner post a $1,000,000 bond in order to vacate the default judgment entered against petitioner?

STATEMENT PURSUANT TO RULE 29.1

Respondent Greyhound Exhibitgroup, Inc. is a wholly owned subsidiary of The Dial Corporation. Greyhound Exhibitgroup, Inc. has no subsidiary companies.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Greyhound Exhibitgroup, Inc. ("GEX" or "Respondent") respectfully requests that this Court deny petitioner's writ of certiorari that seeks review of the opinion of the United States Court of Appeals for the Second Circuit, *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, No. 92-7545, reported at 973 F.2d 155.

STATEMENT OF THE CASE

The only facts essential to this Court's determination whether to grant or deny this petition for certiorari of the judgment and opinion of the Court of Appeals for the Second Circuit affirming the District Court are those facts stated below which were misstated by E.L.U.L.

This action arises from a fire which occurred at a large commercial building owned by E.L.U.L. known as 14 Whale Square, Brooklyn, New York (hereinafter "the premises"). Several tenants of the building, including GEX, sustained substantial property damage as a result of the fire. Consequently, on September 30, 1988 GEX commenced this diversity action in the United States District Court for the Eastern District of New York against E.L.U.L., its landlord and the sprinkler system contractor, seeking damages in excess of $1,500,000.00. In its complaint, GEX clearly averred that its damages were the direct and proximate result of the negligence, gross negligence and negligent omissions of E.L.U.L. in turning off an automatic sprinkler system which permitted a trash fire to become a conflagration.

This case was not, as E.L.U.L. would have this court believe, a case of "exacerbation". E.L.U.L. uses that word in its petition to raise, by implication, the concept that there were fire damages which were only exacerbated by E.L.U.L.'s conceded negligence. Nothing could be further from the truth. Had the sprinkler system, which had been deliberately disabled by E.L.U.L., been operative, the trash fire would have been extinguished in its "incipient stage". Hence, absent the rapid and uncontrolled spread of the fire, the only damage suffered by GEX would have been *de minimis*.

E.L.U.L. did not answer or otherwise plead to the complaint and on November 22, 1988, the Honorable Joseph M. McLaughlin, U.S.D.J. signed a Judgment of Default as to liability, which was duly entered by the Clerk. The District Court found that E.L.U.L.'s default was willful based upon, *inter alia*, the encumbering of the premises with a $4.5 million mortgage in violation of a Court Order and conditioned vacatur upon the posting of a $1 million bond.

After E.L.U.L. failed to post the required bond, an Inquest on damages was ordered. On September 27, 1991, the Inquest was commenced before United States District Judge Leo I. Glasser who subsequently referred the proceeding to United States Magistrate Judge John L. Caden. On December 2, 3, 4 and 10, 1991, the Inquest was held before Magistrate Caden to assess GEX's damages. During the Inquest, Magistrate Caden limited the inquiry, over the objection of E.L.U.L., to GEX's damages sustained in the fire. He specifically refused to allow E.L.U.L. to introduce testimony relative to the comparative fault of the parties. Additionally, no evidence was admitted as to those claims of E.L.U.L. against GEX, which were deemed waived by E.L.U.L.'s failure to plead. On February 21, 1992, Magistrate Judge Caden issued a Report and Recommendation which recommended that judgment be entered in the amount of $1,496,425.60 exclusive of interest. By Memorandum Opinion and Order dated April 22, 1992, Judge Glasser, essentially adopted the Magistrate's Report and Recommendation except for minor modifications.

E.L.U.L. appealed the District Court's ruling, attacking, *inter alia*, the court's refusal 1) to modify the bond requirement; 2) to admit evidence relative to the comparative fault of the parties; and 3) to admit evidence concerning any potential set off which E.L.U.L. may have had against GEX's damage claim. The United States Court of Appeals for the Second Circuit affirmed the District Court's judgment finding that the scope of damage mitigation at a post default Inquest is limited to evidence of "proximate cause" as it relates to the calculation of damages. The court also found that E.L.U.L.'s claim against GEX, relative to GEX's alleged failure to indemnify E.L.U.L. by supplying fire insurance, was a compulsory counterclaim and that by failing to assert it in a timely responsive pleading, E.L.U.L. was foreclosed from raising it in any subsequent proceeding, including the post default damages Inquest.

Petitioner has sought a Writ of Certiorari to review the Court of Appeals decision affirming the judgment of the District Court. Specifically, petitioner argues that it has been denied the right

to mitigate the amount of damages which it owes to plaintiff and that it has been denied the right to prove a meritorious defense.

SUMMARY OF ARGUMENT

I. E.L.U.L.'s PETITION FOR CERTIORARI IS MERITLESS AND SETS FORTH NO SPECIAL AND IMPORTANT REASONS WARRANTING REVIEW ON WRIT OF CERTIORARI.

E.L.U.L.'s Petition for Certiorari is meritless and sets forth no special and important reasons warranting review on Writ of Certiorari. The Second Circuit's decision does not conflict with any decision of this Court or with opinions of the other United States Courts of Appeal. Rather, the Second Circuit's decision presents a fact specific application of well settled principles of law. More to the point, it is beyond dispute that where proximate cause, relating to liability, is properly alleged in a complaint, it is completely and irrefutably established upon the defendant's default. Consequently, the relative fault of the parties is not a proper area of inquiry during an Inquest on damages after a default judgment has been entered. Fed. R. Civ. P. 8.

It is equally clear that any claim which E.L.U.L. may have had against GEX, for GEX's alleged breach of its lease obligation to furnish $1,000,000 in fire insurance, was so logically connected to GEX's claim against E.L.U.L. for fire damage, that it constituted a compulsory counterclaim. Thus, by failing to assert it in a timely responsive pleading, E.L.U.L. has forever waived its right, in any proceeding (including the post default damages Inquest) to do so. Fed. R. Civ. P. 13. Finally, it is also beyond argument that the Court of Appeals correctly found that the District Court did not abuse its discretion by refusing to modify the condition which it placed upon the vacatur of default judgment insofar as there was a finding that E.L.U.L.'s default was willful and that it was reasonable to require it to post a bond under the circumstances.

A. THE COURT OF APPEALS FOR THE SECOND CIRCUIT PROPERLY APPLIED THE CORRECT RULE OF LAW IN AFFIRMING THE DISTRICT COURT'S REFUSAL TO ALLOW PETITIONER, DURING THE INQUEST, TO ARGUE COMPARATIVE FAULT UNDER THE GUISE OF DAMAGE MITIGATION.

There is no conflict among the circuits concerning the consequences of a default judgment. The circuit courts agree that where properly plead proximate cause, going to liability, is completely and irrefutably established upon the defendant's default. *Flax v. Koegel*, 504 F.2d 702 (2d Cir. 1974); *Benny v. Pipes*, 799 F.2d 489 (9th Cir. 1986), cert. denied., 484 U.S. 870 (1987); *Adriana Intern Corp. v. Thoeren*, 913 F.2d 1406 (9th Cir. 1990); *U.S. v. DiMucci*, 879 F.2d 1488 (7th Cir. 1989). The Second Circuit correctly employed this standard below.

E.L.U.L. pays lip service to the above standard and suggests that Federal Rule of Civil Procedure 8(d) and the Second Circuit decision in *TWA v. Hughes*, 449 F.2d 51 (1971), reversed on other grounds, 409 U.S. 363 (1973) (hereinafter "TWA"), read together, stand for the proposition that where the beneficiary of a default seeks unliquidated damages, that beneficiary must *prove* that the defendant caused the damages before an award can be made. However, neither Rule 8(d) nor *TWA*, *supra*, support such a far reaching proposition. As correctly noted by the majority the damages contemplated by the Rule are damages subject to ministerial valuations rather than to an apportionment of fault. This distinction is readily apparent in the following passage from *TWA*, *supra*.:

> The outerbounds of recovery allowable are of course measured by the principle of proximate cause. The default judgment did not give [plaintiff] a blank check to recover from [defendant] any losses it had ever suffered from whatever source. It could only recover those damages arising from the acts and injuries pleaded and in this sense, it was [plaintiff's] burden to show

> "proximate cause." On the other hand, *there was no burden on [plaintiff] to show that any of [defendants] acts caused the well pleaded injuries, except as we have indicated that it had to for the purpose of establishing the extent of the injury caused [plaintiff] in dollars and cents.* (emphasis supplied)

As stated by the Second Circuit in the present case:

> There is a categorical distinction between the element of "proximate cause", as it pertains to the assignment of liability in the first instance, and "proximate cause" as it relates to the ministerial calculation of damages in the context of a default judgment. With regard to liability, the concept of proximate cause supplies the legal nexus between act and injury, and provides a necessary basis for avoiding compensation. Where it is properly alleged in a complaint, proximate cause, going to liability, is completely and irrefutably established upon the defendant's default.

Here, GEX in its complaint, sufficiently alleged that E.L.U.L.'s negligence was the proximate cause of the damages suffered in the fire. Those damages were deemed admitted upon E.L.U.L.'s failure to timely answer. Thus, E.L.U.L.'s contention that it should have been permitted to introduce evidence of GEX's comparative negligence, during the inquest, is without merit as the only damage issue to be decided was the identification and valuation of GEX's property damaged and/or destroyed as a proximate result of the fire.

Moreover, the other authorities relied upon by E.L.U.L. are also inopposite. First, the New York Comparative Negligence law, C.P.L.R. 1411 provides that a plaintiff's damages are diminished in proportion to its relative liability. Here, the default established that E.L.U.L. was 100% culpable for all damages. Second, *Felhaber v. Indian Trails*, 425 F.2d 715 (3d Cir. 1970) is distinguishable because the degree of fault between joint tortfeasors was at issue and thus, evidence which went to the question of relative fault between several tortfeasors was required.

Finally, *Dillon v. Twin State Gas & Electric*, 163 A. 111 (N.H. 1932) and other authorities standing for the proposition that a defendant cannot be held liable for injuries caused by others, should be rejected out of hand as irrelevant where, as here, the defendant defaulted and because this issue was not argued below.

B. THE COURT OF APPEALS FOR THE SECOND CIRCUIT PROPERLY APPLIED THE CORRECT RULE OF LAW IN AFFIRMING THE DISTRICT COURT'S REFUSAL TO ALLOW PETITIONER A SET OFF AGAINST RESPONDENT'S DAMAGE CLAIM.

The Second Circuit ruled that E.L.U.L. was foreclosed, under the compulsory counterclaim provision of Fed. R. Civ. P. 13, from raising a claim for GEX's alleged breach of a lease obligation to furnish $1,000,000 in liability insurance. E.L.U.L. argues that a Writ of Certiorari should be granted because the Second Circuit decision, directly conflicts with recent decisions from the Fifth and Tenth Circuit and most other authorities that have considered the issue. E.L.U.L.'s argument is both factually and legally incorrect.

First, E.L.U.L. once again misstates the facts relative to this issue. E.L.U.L. has never offered any evidence, and none was in the record before the Second Circuit to support the allegation that GEX failed to procure the insurance purportedly required under the lease. In absence of such evidence, E.L.U.L.'s argument is entirely premised upon supposition and speculation and should not be considered by this Court.

Second, in groping for a reviewable issue, Elul disingenuously ignores the majority, opinion holding that its claim for a set off was barred by the compulsory counterclaim provision of Fed. R. Civ. P. 13.

Third, E.L.U.L.'s argument is flawed for a more fundamental reason. In its Petition, E.L.U.L. now suggests for the first time (without any basis) that the Second Circuit affirmed the District

Court's decision to disallow the claim for set off, on the principle of collateral estoppel. A plain reading of the Second Circuit's decision shows that the Circuit Court grounded its decision upon principles attendant to Fed.R.Civ.P. 13(a).

E.L.U.L. raises the issue of collateral estoppel in a desperate attempt to present a reviewable issue. Since the issue of collateral estoppel was neither raised below nor provided a basis for the Second Circuit's decision, this Court should disregard the argument in its entirety and not grant review.

C. THE COURT OF APPEALS FOR THE SECOND CIRCUIT PROPERLY APPLIED THE CORRECT RULE OF LAW IN AFFIRMING THE DISTRICT COURT'S REFUSAL TO MODIFY THE CONDITIONS FOR VACATUR OF THE DEFAULT JUDGMENT.

E.L.U.L. contends that it was deprived of a constitutional right by the District Court's failure to modify the condition to post a $1 million bond to vacate the default. In support of its contention, E.L.U.L. relies primarily upon *Thorpe v. Thorpe*, 364 F.2d 692 (D.C.C. 1966). E.L.U.L.'s reliance upon *Thorpe* is misplaced.

In *Thorpe* the District of Columbia Circuit Court of Appeals held that imposition of a condition that is "impossible" for a party in default to perform may under certain circumstances constitute a denial of due process. In reaching this decision the *Thorpe* court relied upon the decision of the United States Supreme Court in *Societe International v. Rogers*, 357 U.S. 197, 209-210 (1958). This Court in the context of defendant's inability in good faith to produce documents due to the likely imposition of criminal sanctions by a foreign sovereign held that the defendant's due process rights may be implicated by imposition of an "impossible" condition. The *Rogers* Court noted the petitioners had made extensive efforts at compliance and that its inability to comply with the production order was "fostered neither by its own conduct nor by circumstances within its control." *Id.* at 211.

Here, the record is devoid of even a scintilla of evidence to support a claim of a deprivation of a constitutional magnitude. It is beyond cavil that E.L.U.L.'s claim of impossibility of posting the bond rings hollow. At no time did E.L.U.L. objectively demonstrate that it did not have the financial wherewithal to meet the condition imposed by the Court. The record clearly supports that E.L.U.L. had the ability to post the bond had it chosen to do so. In point of fact, Elul did not raise any objection to the condition for vacatur until after the time for their compliance had passed. Moreover, E.L.U.L.'s disingenuous conduct has been exposed throughout these proceedings, by its disregard of Court rules and orders, its concealing of assets and its misrepresentations to the courts below.

Clearly, E.L.U.L. is not a candidate deserving of the relief it presently seeks.

II. CONCLUSION

Respondent, Greyhound Exhibitgroup, Inc., respectfully requests that E.L.U.L.'s petition for a Writ of Certiorari be denied.

Respectfully submitted,

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